79-6743

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

GLOVER ALLISON, :

Petitioner and Appellant, :

- Versus - :

FULTON-DEKALB HOSPITAL AUTHORITY, :

Respondent and Appellee. :

~~ON PETITION FOR WRIT OF CERTIORARI AND~~

APPEAL FROM THE SUPREME COURT OF GEORGIA

CASE NUMBER 35689

~~PETITION FOR WRIT OF CERTIORARI~~

~~AND~~

JURISDICTIONAL STATEMENT

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INTRODUCTION

In the case below, Petitioner sought to raise as a defense to a suit by a hospital a constitutional challenge to the statutory basis for that suit (making fathers exclusively liable for providing necessaries for their minor children). This defense was filed shortly after this Court's ruling in Orr v. Orr, 440 U.S. 268 (1979), which cast considerable doubt on the constitutionality of that statute.

The defense was raised by written amendment in the trial court prior to any hearing on the merits. The form of the amendment complied in all respects to applicable authority. The constitutional defense was considered and ruled upon by the trial court (holding that the statute was not unconstitutional as applied in this case.)

Then, without support of case law or other authority, the Georgia Supreme Court held that the defense had not been timely presented solely because of the length of time that passed between the completion of discovery and the filing of the amendment and indicated thereby that the trial court had erred in considering the defense. The Court thereby created a serious and totally unnecessary barrier to the right of Georgia courts to decide important federal constitutional questions, especially those arising from new rulings by this Court. This case challenges the validity of that ruling as a violation of Petitioner's right to due process of law.

Petitioner asks that this Court grant a writ of certiorari to review the constitutionality of the Supreme Court's ruling and, ultimately, to remand the case to that Court for full consideration of Petitioner's defense. Alternatively, this

case seeks a ruling by this Court on that the constitutional defense had been timely presented for purposes of this Court's jurisdiction to consider the merits of that defense under this Court's mandatory appellate jurisdiction.

STATEMENT OF JURISDICTION (RULES 15-1(b) AND 23-1(b))

This action originated as a suit on a hospital bill brought against Petitioner under former Georgia Code Section 74-105 which provided as follows:

> Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child. 1/

The suit below alleged that Petitioner was liable for hospital services allegedly furnished his minor child. Prior to the trial of this action, Petitioner amended his Answer to assert that the statute upon which the suit was based violated on its face the equal protection clause of the fourteenth amendment to the United States Constitution. The trial court considered the defense and ruled that the statute was constitutional as applied. The trial court's judgment was rendered April 19, 1979; that Court's Order denying Petitioner's Motion for New Trial is dated July 31, 1979.

Petitioner appealed the constitutional issue to the Georgia Supreme Court, which ruled in a departure from precedent that the presentation of the constitutional defense to the trial court had been untimely. The Judgment of the Supreme Court was

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1/ The duty of a father to provide necessaries for his minor children has been interpreted as obligating him to reimburse a third party that provides necessary medical care to such a child in the absence of a contract. E.g., Blue Ridge Park Nurseries v. Owen, 41 Ga. App. 98, 152 S.E. 485 (1930).

rendered on February 28, 1980. Pursuant to Rule 47 of the Rules of the Supreme Court of Georgia, a timely Motion for Rehearing was filed. That Motion for Rehearing was denied on March 13, 1980.

This petition presents two questions for consideration by this Court. The first is whether the procedural rule announced by the Georgia Supreme Court rendering the presentation of Petitioner's constitutional defense untimely constitutes a denial of due process under the United States Constitution; this question falls within this Court's certiorari jurisdiction. 28 U.S.C. §1257(3). The second is whether former Georgia Code Section 74-105 is on its face violative of the equal protection clause of the Fourteenth Amendment; this question falls within this Court's appellate jurisdiction. 28 U.S.C. §1257(2). In both instances, the judgments for which review is sought are the original decision of the Georgia Supreme Court and the denial of the Motion for Rehearing. A notice of appeal was filed with the Georgia Supreme Court on June 6, 1980.

QUESTIONS PRESENTED (RULES 15-1(c) AND 23-1(c))

1. Where prior to trial a civil defendant raises by written amendment a defense under the United States Constitution, may the state court, consistently with the due process clause of the Fourteenth Amendment, hold without support of precedent that the constitutional defense was not timely raised?

2. Does a state statute placing the burden of providing necessaries for minor children exclusively upon the father violate the equal protection clause of the Fourteenth Amendment?

STATEMENT OF THE CASE (RULES 15-1(d) AND 23-1(e))

On February 5, 1975, Respondent Fulton-DeKalb Hospital Authority (hereinafter the Hospital) sued Petitioner Glover Allison on a bill for the cost of hospital services allegedly furnished his minor daughter (deliverance of a baby and the expenses incident thereto). It is undisputed below that the bill in question was not based on any contractual relationship between the Hospital and Mr. Allison. Instead, the sole legal basis for the Hospital's claim was Georgia Code Section 74-105, which, codifying prior Georgia common law, made the father of a minor child statutorily liable for any necessaries furnished by third parties. (This statute has been since repealed and replaced with one that makes each parent liable.) Mr. Allison denied the debt in his Answer to the suit.

On March 5, 1979, prior to the trial of Mr. Allison's case (indeed, prior to any hearing at all in the case), this Court announced its decision in Orr v. Orr, 440 U.S. 268 (1979), which struck down as violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution an Alabama statute making husbands exclusively responsible for alimony in divorce cases. Three days later, the Georgia Supreme Court, following Orr, invalidated various Georgia alimony statutes, which similarly placed the alimony burden solely on the husband. Sims v. Sims, 243 Ga. 275, 253 S.E. 2d. 762 (1979); Stitt v. Stitt, 243 Ga. 413, 254 S.E. 2d. 363 (1979).

Shortly after these decisions - again, prior to any hearing or trial in the case - Mr. Allison amended his Answer to allege that the Georgia statute on which the Hospital's claim was based was violative of the equal protection clause in that it made the father, but not the mother, liable for necessaries

furnished to a minor child by a third party.

The trial court ruled that the statute in question was "not unconstitutional as it applies to this case." This ruling was based, as the lower court judge stated at trial, on a refusal to give "retroactive" application to the decisions of this Court and the Georgia Supreme Court raised in support of Mr. Allison's constitutional defense.

Mr. Allison appealed that ruling to the Georgia Supreme Court which declined to consider the merits of the constitutional issue. Instead, the Court held that the equal protection defense had not been timely raised. Although this defense had been pleaded prior to trial and although the defense had been fully considered by the lower court, the Georgia Supreme Court cited the passage of two years and eleven months between the completion of discovery and the filing of the amendment raising the constitutional defense as the factual basis for its holding that the defense was barred.

On Motion for Rehearing, 2/ Mr. Allison contended that the Court's ruling that the constitutional defense had not been timely raised violated his rights to due process and equal

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2/ The issue of the timeliness of the defense under state procedural law was not raised by any party or court prior to the Supreme Court's ruling in this case. Where the denial of due process has resulted from a ruling of the state Supreme Court, it is sufficient (for the purpose of review by this Court) that Petitioner brings the constitutional error to the attention of

protection of the laws. This Motion was denied. 3/

2/ the State Supreme Court in a Motion for Rehearing. Saunders v. Shaw, 244 U.S. 317 (1917).

3/ Attached to this petition, in addition to the documents specifically required to be attached by this Court's Rule 23, is a copy of the Motion for Rehearing filed by Petitioner in the Georgia Supreme Court. This document shows the manner in which the question of the constitutionality of the Court's ruling on timeliness was presented to that Court, and, as a corollary, the fact that the Georgia Supreme Court necessarily rejected that argument by its denial of the motion.

STATUTORY PROVISIONS (RULE 23-1(d))

The statute, whose constitutionality was challenged below was codified as Section 74-105 of the Georgia Code of 1933 as follows:

> Until majority, it is the duty of the father to provide for the maintenance, protection, and education of his child.

This statute, subsequent to the initiation of proceedings below, was revised to provide that each parent would be under such a duty. 1979 Ga.L. 466, 492. Since the rights of the parties in the instant action are governed by the statute as originally worded, Petitioner does not here set out the full text of the revision.

OPINION BELOW (RULES 15-1(a) AND 23-1(a))

The original rulings of the trial court herein, the State Court of Fulton County, bore the style Fulton-DeKalb Hospital Authority, T/A Grady Memorial Hospital v. Glover Allison, and the number 520625. These opinions are not, and will not be, reported. The rulings of the Supreme Court of Georgia in the appeal from the trial court's judgment and denial of Motion for New Trial were styled Allison v. Fulton-DeKalb Hospital Authority and bore the number 35689. They are reported at 245 Ga. 445, ____ S.E. 2d ____ (1980).

REASONS FOR ALLOWANCE OF WRIT (RULE 23-1(h))

A ruling that bars a litigant from presenting a claim or defense may constitute a denial of due process. Saunders v. Shaw, supra; Chambers v. Mississippi, 410 U.S. 284 (1973); Green v. Georgia, 442 U.S. 95 (1978). Specifically, this Court has indicated in the clearest terms that the application of a procedural rule that prevents a litigant from asserting a federal constitutional right will be carefully scrutinized. See Henry v. Mississippi, 379 U.S. 443 (1965). 4/ Unless that rule as applied "serves a legitimate state interest ..., the state procedural rule ought not be permitted to bar vindication of important federal rights." Id. at 447-48. The rule must be "a reasonable one and clearly announced to defendant and counsel." Id. at 448, n.3.

The rule announced by the Georgia Supreme Court in the instant case - that the mere passage of time (without the showing of any prejudice) can bar the raising of a constitutional defense - fails both parts of the Henry test:

4/ Although the question discussed in Henry was whether the application of the state procedural rule barred review by the United States Supreme Court (see infra, note - and accompanying text), the central consideration - balancing the state interests allegedly served against the interests of the litigant - is the same as the test used to determine the constitutionality of a state procedural rule as applied. See, e.g., Chambers v. Mississippi, supra at 302.

1. The rule was not clearly announced - It is telling that the Georgia Supreme Court cites no prior cases holding that a constitutional challenge may be barred by time even if it is raised prior to any occasion for its actual consideration by the trial court. There are no such cases.

The Court correctly states the general rule that a constitutional challenge must be raised "at the first opportunity." Brackett v. State, 227 Ga. 493, 181 S.E. 2d 380, 382 (1971). But the previous decisions of that Court had uniformly understood "first opportunity" to refer to the first opportunity for a ruling in the court below. Thus, for example, in Brackett v. State, supra, the Court held that a defendant who is aware of a constitutional claim cannot raise it after the verdict. Nor may it be raised in a Motion for new trial. Loomis v. State, 203 Ga. 394, 405, 47 S.E. 2d 58 (1948); Woods v. State, 222 Ga. 321, 149 S.E. 2d 674 (1966). Accordingly, a constitutional challenge that will affect jury instructions cannot be raised after the jury charge. Boyers v. State, 198 Ga. 838, 843, 33 S.E. 2d 251, 254-55 (1945).

What these and all of the other related cases have in common is that the constitutional challenge was raised after a ruling, verdict, judgment, etc., that would have been affected by the challenge if it had been brought to the lower court's attention earlier. The Court's approach to these situations has been consistent with the general policy on the raising of claims and defenses generally and evidentiary objections in particular: a litigant waives a claim or objection if he allows the court to make a ruling or allows evidence to be introduced without first making the relevant claim or objection known to the court.

Not only was Mr. Allison's amendment timely under the standards set by prior case law, but under applicable statutory

standards as well. "A party may amend his pleading as a matter of course and without leave of court at any time before the entry of a pre-trial order." Ga. Code §81A-115(a). (There was no pre-trial order entered in the instant case.) "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." Ga. Code §81A-115 (c).

In short, the suggestion that Petitioner's ability to raise a constitutional defense might be prejudiced merely by the passage of time prior to trial appears in no case or other authority prior to the decision in the instant action.

2. The rule does not reasonably serve a legitimate state interest - Henry v. Mississippi, supra, is remarkably analogous to the instant case. In Henry, a criminal defendant's attorney failed to object to the introduction of evidence obtained during an i legal search and seizure, but sought to raise the objection in a motion for directed verdict. The state courts overruled the objection on the ground that it was waived by the failure to assert it when the evidence was first tendered - the so-called contemporaneous objection rule.

The Henry Court found that the rule generally served a legitimate state purpose (it "gives the court the opportunity to conduct the trial without using the tainted evidence" id. at 448), but questioned whether that purpose was not equally well-served in the particular trial by raising the objection by the motion for directed verdict. If so, then "enforcement of the rule here would serve no substantial state interest." Id. at 449. In such a situation, the procedural rule should not be applied "mechanistically to defeat the ends of justice." Chambers v.

Mississippi, supra at 302.

In the instant case, Petitioner does not question the legitimacy of the general rule of timely presentation of constitutional issues - that such issues must be presented to the court at its first opportunity to rule. But here that rule was unquestionably complied with. Petitioner raised his constitutional defense by written amendment prior to trial, and the trial court considered and ruled on that defense.

The ruling of the Georgia Supreme Court - that Mr. Allison's claim was nevertheless barred because of the passage of time between the completion of discovery and the filing of the amendment - does not serve the interest addressed by the general rule. That interest is similar to the one discussed in Henry - to assure that the lower court can conduct the trial fully aware of relevant constitutional issues. But that interest would not have been better served by raising the defense in 1976, as opposed to 1979. 5/

5/ Nor would judicial economy generally have been served. The Georgia Supreme Court speaks somewhat disingenuously about allowing a Defendant "to delay asserting his defenses indefinitely in hopes that a decision will be rendered which provides him with an arguable constitutional defense." Allison v. Fulton-DeKalb Hospital Authority, supra at 446. There is, in fact, nothing in the record that suggests a connection between the timing of the filing of Mr. Allison's defense and any delay in the trial of the case. Nor could there be since

In short, the rule announced by the Georgia Supreme Court could not have been predicted on the basis of prior decisions. Nor does it serve any readily discernible legitimate state interest. Indeed, the record discloses no prejudice of any kind to the court or to the opposing party as a result of the timing of the filing of Petitioner's challenge.

The implications of this rule for litigation in Georgia under both the state and federal constitutions are substantial. A litigant could heretofore feel secure that a constitutional challenge was timely raised if filed before the first occasion for the trial court to consider it. Now the timeliness of the filing of a constitutional challenge will be measured against the time when the challenge theoretically could have been filed. The courts will then have to determine (despite the lack of any prejudice to the court or other parties) whether the intervening time was so great as to bar the raising of the claim. Such a standard is manifestly fuzzy, subjective, and consequently subject to wide variation among the courts.

Because the procedural rule announced in the instant case fails the Henry test and because of the great impact this rule will have on constitutional litigation in Georgia, Petitioner prays that this Court issue a writ of certiorari to the Georgia

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5/ Petitioner's counsel did not consider that defense until the decision in Orr v. Orr was announced and was not aware of that case prior to the announcement. Far from delaying the assertion of the defense, Petitioner filed it with the trial court just eighteen days after Orr was decided.

Supreme Court and, ultimately, to return this case to that Court for full consideration of his constitutional defense.

SUBSTANTIALITY OF FEDERAL QUESTION (RULE 15-1(e))

Up to this point Petitioner has sought review by this Court of the procedural rule which barred him from fully presenting his federal constitutional defense in the state courts. Alternatively, Mr. Allison presents for this Court's consideration under its appellate jurisdiction, the trial court's ruling on the constitutional defense itself - holding that Georgia Code Section 75-105 was constitutional as applied. 6/

The question whether a federal law claim has been properly presented in the state court to entitle the litigant to review in this Court is an issue of federal law for this Court to decide. Saunders v. Shaw, supra; Henry v. Mississippi, 7/

6/ Petitioner emphasizes the question of the procedural rule because of its impact on the litigation of constitutional issues in the Georgia State courts. Moreover, Petitioner believes it appropriate to be given an opportunity to have his constitutional defense considered and ruled on by the Georgia Supreme Court. Thus, Petitioner has urged the issuance of a writ of certiorari on the first question presented.

However, for reasons discussed below, the second question - the constitutionality of Ga. Code §74-105 - is within this Court's appellate jurisdiction. Therefore, if the Court chooses not to grant the petition for certiorari on the first question, Mr. Allison presents this case as an appeal for a resolution of his constitutional challenge to the state statute. Accordingly, the rulings of the trial court are attached hereto to show the constitutional rulings appealed to the Georgia Supreme Court.

7/ The precise question in the instant case is

supra; Love v. Griffith, 266 U.S. 32 (1934). Here, the constitutional question was presented to the trial court, was ruled on by the trial court, and was presented on appeal to the Georgia Supreme Court. Mr. Allison could have done no more. See Saunders v. Shaw, supra.

The instant case presents a substantial federal question, namely the application of this Court's holding in Orr v. Orr, supra to a state child support statute which placed the burden of providing necessaries to minors exclusively on the father.

Specifically, the issue is whether a statute that makes a minor child's father exclusively liable for necessaries furnished to the child violates the equal protection clause of the fourteenth amendment to the United States Constitution. While this Court's analysis in Orr suggests that such a statute would be constitutionally offensive, that question has not been ruled on by either this Court or the Georgia Supreme Court.

In this case, a sixteen year old minor was furnished

7/ whether the procedural ruling of the Georgia Supreme Court, holding that Mr. Allison's constitutional defense was not timely presented, bars this Court from considering the merits of that defense on appeal. Such was the specific issue raised in Henry. Under the analysis discussed in the previous section, supra, the procedural rule applied by the Georgia Supreme Court, not serving a legitimate state interest, would not bar review by this Court of Mr. Allison's constitutional challenge.

medical services. In the absence of any agreement to pay, the challenged statute made the minor's father liable for those medical services, but not the minor's mother. The issue is: does a statute that makes the male parent, but not the female parent, liable rationally serve a constitutionally legitimate governmental purpose?

The obvious rationale for this statute is an assumption about the respective responsibilities of a mother and father with regard to the support and maintenance of their children. That is, the statute clearly rests on the proposition that the mother is responsible for staying at home and raising the child, while the father is responsible for providing financial support for the child. In 1975, the year that the instant law suit was filed, the United States Supreme Court categorically rejected the argument that a gender-based statutory classification could rest on the notion that "generally it is the man's primary responsibility to provide a home and its essentials." Stanton v. Stanton, 421 U.S. 7, 10 (1975). The court went on to add: "No longer is the female destined solely for the home and the rearing of the family, and only the male for the market place and the world of ideas." Id., at 14-15.

Seen in the most favorable light, the statute challenged here is a crude attempt to cast the support responsibility on the parent that the legislature assumed actually provided the financial support for the family. But, of course, the fact is that for a long time mothers in substantial numbers have engaged in gainful activity either to supplement the family's income or, in many cases, to provide the primary source of support for the family. While it is arguably reasonable to cast the support burden on the parent actually providing the support, it is manifestly unreasonable

to use a classification based solely on gender "as an inaccurate proxy for other more germane bases of classification." Craig v. Boren, 429 U.S. 190, 198 (1976).

It might be argued that the classification, while inaccurate, is at least easy to apply. But certainly it is no more easy to apply than the current statute which makes both parents jointly responsible for the support of minors. Moreover, the United States Supreme Court has held that "administrative ease and convenience" is not a legitimate governmental purpose that will support a gender-based classification Stanley v. Illinois, 405 U.S. 645, 656 (1972); Frontiero v. Richardson, 411 U.S. 677, 690 (1976). Neither will the avoidance of "intrafamily controversy" provide such a basis. Reed v. Reed, 404 U.S. 71, 77 (1971).

In short, the statute challenged here rests on assumptions about the distribution of responsibilities within the family, which are frequently inaccurate and which the United States Supreme Court has held can not serve as the basis for the statutory distribution of burdens and benefits on the basis of gender.

CONCLUSION

Because the first issue presented in this petition has a profound impact on constitutional litigation in the Georgia state courts, Petitioner urges that this Court grant a writ of certiorari to consider that question. Alternatively, since the second issue presents a substantial federal question within the mandatory appellate jurisdiction of this Court, Mr. Allison asks that the Court note probable jurisdiction and set the case down for briefing and oral argument.

Respectfully submitted,

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